STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2011
v	No. 292470 Wayne Circuit Court
STANLEY JEROME BROWN, Defendant-Appellant.	LC No. 02-006678-FH

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant appeals as on leave granted the denial of his request for a new trial, after his conviction by a jury of four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520(c) (sexual contact with a person under thirteen years of age).[1] The trial court sentenced him to seven to 25 years' imprisonment. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Between January and February of 2002, defendant touched the breasts and buttocks of T., age 12, on multiple occasions while she was a resident of the Catherine Drexel Samaritan Center, where defendant was a drug counselor. T. gave a statement to the police on February 12, 2002, alleging that defendant touched her breasts and buttocks four times. T. testified at a preliminary examination on May 23, 2002, stating that defendant touched her breast four times and also touched her buttocks. She also testified that of the four times she met with defendant, he touched her three times.[2]

A jury trial was held on November 13 and 14, 2002. At the time of the trial, T. was 13 years old. In defendant's opening statement, trial counsel argued that T.'s and the other complainants' stories were fabricated. T. described the sexual conduct defendant allegedly engaged in, including touching her breasts and buttocks and speaking with T. with his hand

[1] The jury acquitted defendant on charges involving two other complainants.

[2] Apparent inconsistencies among T.'s accounts form the basis of some of defendant's appellate arguments.

inside his pants. On cross-examination, defendant's trial counsel asked T. if she could remember how many individual counseling sessions she had had with defendant, to which she responded, "[f]our? Three?" When trial counsel asked her "[y]ou're not really sure?" T. responded, "[y]es." The jury convicted defendant of four counts of CSC II.

On August 20, 2005, T. testified in a deposition taken in preparation for a civil case her mother had filed on her behalf against defendant, Holy Cross Childrens' [sic] Services, and the National Council on Alcoholism and Drug Dependence. T. testified that defendant had acted inappropriately towards her three times. She also testified that defendant brushed his hand down her chest and grabbed her breast and lifted it up.[3]

Defendant filed a motion for relief from judgment, requesting a new trial. Defendant's motion was denied by the trial court. The denial of defendant's motion was affirmed by this Court. In lieu of granting leave, the Michigan Supreme Court remanded the matter to the trial court for a *Ginther*[4] hearing to determine whether defendant received effective assistance of counsel and whether evidence discovered in the civil case was newly discovered evidence that would require a new trial. After conducting the *Ginther* hearing, the trial court found that defendant did receive effective assistance of counsel at trial and found that the allegedly newly discovered evidence did not require a new trial. Defendant filed an application for leave to appeal the trial court's decision, and this Court denied leave to appeal. In lieu of granting leave, the Michigan Supreme Court remanded the case to this Court to determine whether defendant received effective assistance of counsel and whether newly discovered evidence would require a new trial.

II. ANALYSIS

Defendant first argues that he did not receive effective assistance of counsel at trial because trial counsel failed to procure the National Council on Alcoholism and Drug Dependence staff activity log, which defendant claims would have vindicated him because it showed that T. had only had one individual counseling session with defendant. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law; this Court reviews the trial court's findings of fact for clear error and reviews questions of law de novo. *People v LeBlanc*, 465 Mich 575, 579; 630 NW2d 246 (2002).

The fundamental right to counsel includes the right to effective assistance of counsel. *People v Prubat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To obtain appellate relief based on an ineffective-assistance claim, a defendant must overcome the strong presumption that counsel's assistance was effective. *LeBlanc*, 465 Mich at 578. The defendant must show that (1) counsel's performance was objectively unreasonable, (2) "it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error," *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), and (3) the result that did occur was

[3] These details were not present in T.'s testimony at trial.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Trial counsel's failure to investigate can constitute ineffective assistance of counsel when the defendant shows that counsel's decision not to investigate meets these criteria. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Counsel must either make reasonable investigations or make a reasonable decision that makes a particular investigation unnecessary. *Id*. at 485.

Defendant argues that trial counsel's failure to request the activity log was unreasonable because the activity log likely would have vindicated him. We disagree. The activity log would not have supported trial counsel's theory of the case, which counsel arrived at after a reasonable investigation. Trial counsel engaged in discovery and successfully obtained police reports, witness statements, and counseling and psychological reports concerning the complainants. Defendant had told trial counsel of the existence of the activity log, which was defendant's own account of how he spent his time, but trial counsel did not obtain the activity log. At the *Ginther* hearing, trial counsel indicated that the number of individual counseling sessions each complainant had with defendant was not his primary concern, because each girl had had an opportunity to be alone with defendant. Counsel decided upon the defense theory that the girls had fabricated the complaints against defendant.

That counsel was aware of the existence of the activity log but failed to request it is not determinative in this case. Counsel's decision to pursue a fabrication theory of defense was a reasonable decision that was made after counsel engaged in discovery. Defendant has not shown that trial counsel's failure to procure the activity log was objectively unreasonable in light of counsel's theory of defense, nor has defendant shown that the development of counsel's trial strategy was unreasonable.

Even if trial counsel's failure to obtain the activity log resulted from an objectively unreasonable decision, counsel's failure would not have provided a reasonable probability of acquittal. If a defendant alleges that his trial attorney's error was a failure to investigate, the defendant must show that counsel's failure to investigate resulted in "counsel's ignorance of valuable evidence which would have substantially benefitted the accused." *People v Johnson (After Remand)*, 125 Mich App 76, 81; 336 NW2d 7 (1983); see also *People v Caballero*, 184 Mich App 636, 640 (1990). Defendant argues that the activity log would have benefitted him at trial because it was potentially exculpatory evidence that would have assisted the jury in evaluating T.'s testimony. The trial court reviewed the evidence at the *Ginther* hearing and found that the activity log "wouldn't have made any kind of difference in the trial." The trial court noted that even if the activity log had been admissible, it verified T.'s testimony that she saw defendant on four occasions rather than refuted that testimony. It is also noteworthy that the activity log was created by defendant and that, even though defendant testified on his own behalf, he did not argue that he had not seen T. alone on as many occasions as she alleged. We agree with the trial court's that there is no reason to believe that had the activity log been presented at trial, it would have provided a reasonable probability of acquittal.

Defendant also argues that he was denied effective assistance of counsel at trial because trial counsel did not sufficiently cross-examine T. concerning the inconsistencies among the statement she gave to police, her testimony at the preliminary hearing, and her testimony at trial. An attorney's decisions about what evidence to present, which witnesses to call, and how to

question them are presumed to be trial-strategy decisions. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). A defendant will only have a claim for ineffective assistance of counsel when trial counsel's failure to call a witness or present evidence deprived the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

While we recognize that there were inconsistencies among T.'s accounts, trial counsel's failure to cross-examine T. on these inconsistencies did not constitute ineffective assistance of counsel. This Court has noted that "failure to attack the credibility of a witness could be a sound trial strategy where it is perceived that the jurors empathize with the witness." *People v Nickson*, 120 Mich App 681, 686 n 2; 327 NW2d 333 (1982). T. was 13 years old at the time of trial and gave a very detailed account of the manner in which defendant touched her. It is conceivable that trial counsel perceived the jurors empathized with T. Further, trial counsel did get T. to admit on cross-examination that she could not remember how many individual counseling sessions she had had with defendant. Finally, T.'s various statements, when viewed as a whole and considered in light of her age, were largely consistent, and it is conceivable that counsel did not wish to draw further attention to this.[5] We conclude that defendant was not denied effective assistance of counsel at trial.

Defendant argues that he was denied effective assistance of counsel at the *Ginther* hearing because his appellate attorney at that hearing did not sufficiently examine trial counsel regarding his failure to impeach T. at trial. Defendant argues in the alternative that because the trial court interrupted appellate counsel in his line of questioning at the hearing, the trial court prevented appellate counsel from rendering effective assistance.

To establish a claim of ineffective assistance of appellate counsel, a defendant must show that counsel's performance was objectively unreasonable and that the unreasonable performance prejudiced his appeal. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). A defendant must also overcome the presumption that the challenged action was sound appellate strategy. *People v Reed*, 449 Mich 375, 390-91; 535 NW2d 496 (1995). Normally, appellate counsel chooses which arguments to advance in the appellate setting as a matter of strategy. *Uphaus*, 278 Mich App at 186-187. Appellate counsel's decision to focus on arguments that are more likely to prevail does not render counsel's assistance ineffective. *Reed*, 449 Mich at 391.

At the *Ginther* hearing, defendant's appellate counsel questioned defendant's trial counsel about his decision not to impeach T. concerning inconsistencies in her accounts. The trial court found counsel's arguments unpersuasive. Before the trial court reached its decision, appellate counsel extensively argued issues involving trial counsel's failure to obtain the activity log, and less extensively argued that trial counsel was ineffective for his failure to cross-examine T. concerning her inconsistencies. Defendant has not shown that counsel's decision to focus on one argument more than the other was an objectively unreasonable strategy, nor has defendant

[5] Trial counsel's testimony at the *Ginther* hearing makes clear that he did not recall with precision the details concerning the cross-examination issue. Counsel did state that with younger criminal sexual conduct victims, it is common for dates of offenses to be imprecise.

shown that this decision prejudiced his appeal, in light of the reasonable basis for the failure to cross-examine T., as discussed above.

During the *Ginther* hearing, the trial court interrupted appellate counsel to clarify a question and subsequently read from the trial transcript. However, the trial court also asked counsel if he had any further questions regarding the conflicting testimony, and only moved on after appellate counsel stated he had no further questions. We conclude that the trial court's interruption did not interfere with defendant's attorney-client relationship and did not prevent counsel from rendering effective assistance.

Defendant lastly argues that he is entitled to a new trial on the basis of newly discovered evidence. This allegedly newly discovered evidence is the staff activity log and T.'s deposition testimony in the civil lawsuit T.'s mother filed on her behalf. This Court reviews a trial court's decision to grant or deny a new trial for an abuse of discretion, *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003), and reviews the trial court's factual findings for clear error, MCR 2.613(C). To receive a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not cumulative, (3) could not have been discovered and produced at trial, and (4) makes a different result probable on retrial. *Cress*, 468 Mich at 692.

In order for evidence to be newly discovered, the defendant must not have been aware of the evidence before trial. *People v Terrell*, 289 Mich App 553, 564; 797 NW2d 684 (2010). Defendant made it clear to trial counsel that he wanted the activity log before trial. Because defendant was aware of the activity log before trial, by definition it is not newly discovered evidence.

In addition, the subsequent testimony by T. in the civil case her mother filed on her behalf does not warrant a new trial. Newly discovered evidence will not warrant a new trial when it would be used merely for impeachment purposes. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989). Similarly, newly discovered evidence will not warrant a new trial when it only relates to the credibility of a witness. *Terrell*, 289 Mich App at 559. During T.'s civil deposition, she stated that defendant brushed his hand down her chest, and grabbed her breast and lifted it up. T. had not included these details of defendant's conduct when she testified at trial, and there were certain other variations between the civil testimony and the trial testimony. Yet many details between T.'s testimony at the civil deposition and her testimony at trial were the same. Defendant argues that the inconsistencies constitute newly discovered evidence; however, defendant does not cite any law to support his position. The difference between T.'s testimony during the civil deposition and her testimony at trial does not rise to the level of newly discovered evidence because the inconsistencies would only be used for impeachment purposes. We find no basis for reversal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter